Insight: Construction

March 20, 2011

Libyan Civil Unrest – Contractor's Remedies

The civil unrest in Libya in recent weeks has seriously affected foreign contractors working in that country. Many contractors have had their construction sites damaged and their equipment, materials and temporary works looted or destroyed and have evacuated their personnel from Libya.

While the Government of Moammar Gadhafi has reportedly expressed its willingness to compensate certain contractors for the damage that they had suffered,[1] contractors will be well advised to ensure that they have taken the appropriate steps under their respective contracts and applicable law to protect their rights.

This raises the question of what steps contractors should be taking. To answer this question, each contractor needs to begin by examining the terms of its own contract, as well as Libyan law, and evaluate its position against the events and circumstances affecting it in Libya. However, the general kinds of steps that a contractor should be taking can be illustrated – whatever the particular construction contract concerned – by looking at the most widely used form of international construction contract, namely, the FIDIC Conditions of Contract for Construction, first edition, 1999 (commonly called the "**Red Book**"). Under the Red Book, there are at least four sets of provisions that would be relevant in this situation:

(1) the *Force Majeure* clause (Clause 19),

(2) the clause protecting the Contractor against "Employer's Risks" (Sub-Clauses 17.3 and 17.4),

(3) the Employer's indemnity obligation (Sub-Clause 17.1), and

(4) the claims and disputes clause (Clause 20).

A contractor's rights under these clauses would normally be supplemented or qualified by whatever may be provided for by Libyan administrative and/or civil law. In this connection, Libya has an excellent modern Civil Code dating from 1954 which is very similar to the current Egyptian Civil Code of 1949.

(1) The *Force Majeure* Clause

Sub-Clause 19.1 of the Red Book defines "*Force Majeure*" as an "exceptional event or circumstance":

"(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

White & Case has vast experience in construction disputes globally, including disputes arising from projects in North Africa and the Middle East. More particularly, we have represented many contractors in their activities in the region over the past 25 years.

Our experience includes disputes arising out of situations such as the Iranian Revolution in 1978 – 79, the invasion of Kuwait by Iraq in 1990 and the current civil unrest in North Africa and the Middle East, where we are working with several parties in connection with the recent events in the region, in particular in Libya. Therefore, we thought it useful to share a high-level analysis of the legal steps that our clients should be thinking about in connection with their Libyan activities.

The principal author of the analysis, Christopher Seppälä, is both a partner of White & Case LLP in Paris and the Legal Advisor of the Contracts Committee of FIDIC (*Fédération Internationale des Ingénieurs-Conseils*) which publishes the most widely used forms of international construction contract.

1 *See* article "*Turkish Losses in Libya To Be Compensated*", published by Dünya Times on February 22, 2011, available on the internet at www.dunyatimes.com/en/?p=10582 and article "*Libya Promises Compensation for Korean Firms Damaged by Rioting*", published by the Korea Times on January 24, 2011 (with respect to Korean contractors), available on the internet at www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=80207.

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party."

Sub-Clause 19.1(ii) and (iii) of the Red Book further provides that *Force Majeure* includes:

"(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion disorder…"

Under this definition, the events in Libya will almost certainly constitute *Force Majeure* if they prevent the contractor from performing "any of its [contractual] obligations" (*see* Sub-Clause 19.2). However, where the contract is concluded with the Libyan State or an entity controlled by the Libyan State, it could be argued under this definition that the recent events do not qualify as *Force Majeure* because they are "substantially attributable" to the Libyan State. If so, the Libyan State might have liability to the foreign contractor on other grounds.

Under Sub-Clause 19.2, a party must give notice within 14 days after it became aware, or should have become aware, of the event constituting *Force Majeure* and will then be excused from performing the contract for as long as the *Force Majeure* continues. Under the Red Book, not only will the contractor be entitled to claim an extension of time for any resulting critical delay – which is normally the only remedy provided for by a typical *Force Majeure* clause – but in a case where the events defined in Sub-Clause 19.1(ii) and (iii) occur in the country in which the site is located (Libya, in the present case), the contractor can also recover the costs it has incurred, whether on or off the site, including overhead but excluding profit, by reason of the *Force Majeure* event. This is a very favorable provision for contractors.

The contractor will have the burden of proving that it has been prevented from working by the *Force Majeure* event and will have to provide all necessary particulars and evidence to justify its right to an extension of time and to the additional costs it claims.

If the execution of the works is prevented for a continuous period of 84 days (12 weeks) or for multiple periods which total 140 days (20 weeks) by *Force Majeure*, either party may, pursuant to Sub-Clause 19.6, terminate the contract. In this case, the contractor would be entitled essentially to be paid for work done, including the cost of removing its equipment and repatriating its personnel, but would not be entitled to loss of profit on the balance of the work remaining to be done. If the employer would want to ensure that the contractor remains available to perform the contract for a period longer than 84 or 140 days, the employer would need to come to a special agreement with the contractor.

On the other hand, if performance of the contract has not merely been prevented but performance of the contract becomes impossible (*e.g.* because the contractor's site has been so completely destroyed that the original works can no longer be built on it), then he may claim for release from the contract immediately under Sub- Clause 19.7 and, possibly, under Libyan law as well (*see* Article 663 of the Libyan Civil Code dealing with "Impossibility of Performance"). In this case, the contractor is entitled, under Sub-Clause 19.7, to be reimbursed to the same extent as if the contract were terminated as the result of prolonged *Force Majeure*, as described above.

(2) "Employer's Risks"

In general, under construction contracts, the contractor has full responsibility for the care of the works, including contractor's equipment, materials, plant for incorporation into the permanent works and temporary works, from the commencement date until issuance of the taking-over certificate. However, if any loss or damage should happen to any of those things due to "Employer's Risks", as defined, then the contractor must, pursuant to Sub-Clauses 17.3 and 17.4, promptly give notice of this to the engineer and, if the engineer should require the contractor to rectify the same, the contractor would be entitled to recover the additional cost (including overhead but excluding profit) and, if he has suffered critical delay, to obtain a time extension. "Employer's Risks" are defined in Sub-Clause 17.3 in similar fashion to the definition of "*Force Majeure*" in the *Force Majeure* clause and include:

"(b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war [within the country of the site]

(c) riot, commotion or disorder [within the country of the site]."

Thus, if the contractor is required by the engineer to rebuild a plant which was half-way through construction when it was destroyed by a bomb, for example (a *Force Majeure* event), the contractor would be entitled to be compensated for the cost thereof and be granted an appropriate time extension.

(3) Employer's Indemnity Obligation

Under Sub-Clause 17.1, the employer is required to indemnify and hold the contractor harmless from "all claims, damages, losses and expenses (including legal fees and expenses) in respect of Employer's Risks", as defined above. Thus, even if the contractor were unable to recover its damages under Sub-Clauses 17.3 and 17.4 because, for example, the employer were to decide not to ask the engineer to instruct the contractor to rectify or rebuild the works, the contractor should have a good basis for recovering its damages under Sub-Clause 17.1.

Therefore, subject to what Libyan law may provide, the Red Book would appear to afford the contractor satisfactory remedies and relief in the present exceptional situation in Libya.

(4) Claims and Disputes Clause

In addition to giving the notices and particulars required by the substantive clauses of the Red Book described above, the contractor would also need to take care to comply with the claims procedure and any pre-arbitral procedure provided for by its contract, and which is provided for in Sub-Clauses 20.1 to 20.5 of the Red Book.

If it is unable to get satisfaction of its claims through the claims procedure and any pre-arbitral procedure, it will need to determine what procedure its contract provides for as regards the final resolution of disputes with the employer. If – as is quite common in the case of major international construction contracts with Libyan public entities – its contract provides for the final resolution of disputes by arbitration:

(a) under the Rules of Arbitration of the International Chamber of Commerce (the "ICC"), and

(b) at a suitable location outside Libya, such as Paris, France or Geneva, Switzerland,

then this should be a satisfactory solution. In this case, the contractor's only major worry would be how to induce the Libyan party to pay any favorable award which it might obtain. As a contractor may encounter difficulties in having a favorable award enforced against a Libyan public entity through Libya's court system, as a practical matter, it will be critical that it take steps at an early stage to ensure that the ICC arbitration will be conducted in such a way that the Libyan party will accept, and be willing voluntarily to pay, the ICC arbitrator(s)' award.

In the authors' experience, this is feasible. One of the authors represented a foreign contractor in an ICC construction arbitration against a Libyan public entity a few years ago. In that case, the three person arbitral tribunal issued a unanimous award in the contractor's favor and the Libyan party subsequently paid the award. However, to achieve such a result, in the authors' view, the Libyan party (as well as the contractor) must be persuaded to have confidence in the composition of the tribunal and the conduct of the arbitration, and to find the award reached to be fair. Thus, the foreign contractor must pay special attention to these points, as well as to purely legal or contractual points, when preparing a case for arbitration.

In conclusion, while we can make no predictions as to how current events in Libya will unfold, past experience indicates that foreign contractors may be able to obtain compensation for the losses or damages that they are sustaining as the result of the civil unrest there. If they have satisfactory rights to claim in their contract (as are afforded, for example, by the provisions of the Red Book, as we have seen), a right to international arbitration at a suitable location outside Libya and if they otherwise proceed prudently, in the manner described above, they should have a good chance of being compensated for their losses and damages. In the authors' experience, while Libyan public officials are tough negotiators and can sometimes take a long time to arrive at decisions, if they are approached in the right way, and with sensitivity to the culture of their country, disputes under construction contracts tend ultimately to be addressed in a business-like manner by the Libyan State party.

For further information please contact:

Christopher R. Seppälä
Partner, Paris
+ 33 1 55 04 15 45
cseppala@whitecase.com

Nicolas Bouchardie
Associate, Paris
+ 33 1 55 04 15 77
nbouchardie@whitecase.com